



Signed and Filed: April 27, 2012

A handwritten signature in black ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 10-32053 TEC
)	
EL CAMINO CHARTER LINES, INC.,)	Chapter 11
dba EL CAMINO TRAILWAYS,)	
)	
)	
)	
Debtor.)	
)	

**MEMORANDUM DECISION RE DEBTOR'S OBJECTION TO UNSECURED DEFICIENCY
CLAIM OF TCF EQUIPMENT FINANCE, INC.**

On April 10, 2012, the court held a trial regarding Debtor's objection to the claim of TCF Equipment Finance, Inc. (TCF). Ruth E. Auerbach appeared for Debtor. Margaret E. Garms appeared for TCF.

Upon due consideration, and for the reasons set forth below, the court determines that TCF has an allowed unsecured deficiency claim in the amount of \$375,705.

FACTS

TCF financed Debtor's acquisition of six buses. Three of the buses were acquired through secured loans; the remaining three buses were leased from TCF. Debtor surrendered all six buses to

1 TCF in 2011. TCF sold all six buses and applied the sale proceeds
2 to the amounts due under the secured loan and the lease. The
3 parties agree that the balance due under the two contracts after
4 application of the sale proceeds is \$386,052, including all fees
5 and expenses.

6 The dispute before the court is whether TCF sold its
7 collateral in a commercially reasonable manner, and if not, what
8 damages Debtor suffered as a result of TCF's failure to do so. The
9 court heard the testimony of five witnesses regarding the manner in
10 which the buses were sold, the appraised value of the buses at the
11 time they were sold, and the sale price actually obtained for the
12 buses.

13 **1. Buses Sold to ABC Companies**

14 TCF caused three of the surrendered buses (numbers 34, 36, and
15 738)¹ to be delivered to ABC Companies (ABC). ABC is the largest
16 seller of used buses in North America. One bus (36) was delivered
17 to ABC in January 2011; the remaining two buses were delivered in
18 July 2011. All three buses were inspected by ABC, were listed for
19 sale on ABC's website, and were available for examination by
20 prospective purchasers on ABC's lot. ABC was to be paid a four-
21 percent commission on any sale it arranged.

22 It is undisputed that the prime season for selling used buses
23 is between January and June of each year.

24 ABC located two parties that made offers to purchase. In
25 October 2011, the first potential purchaser offered to buy buses 34
26 and 36 for \$140,000 each. TCF made a counter-offer to sell the
27 buses for \$155,000 each, but that offer was refused and no sale was
28

¹ The numbers used to identify each bus are the last numbers of the VIN.

1 made. Sometime after October 2011, the second potential purchaser
2 located by ABC offered to buy buses 34 and 36 for \$100,000 each.
3 TCF refused that offer. TCF received no further offers regarding
4 buses 34 and 36, and no offers at any time regarding bus 738.

5 On February 27, 2012, two months into the peak resale season,
6 and when it had received no further offers to purchase any of the
7 three buses it had listed for sale through ABC, TCF sold all three
8 buses to ABC. ABC paid TCF \$125,000 for bus 34, \$135,000 for bus
9 36, and \$30,000 for bus 738.

10 Debtor's appraiser testified that in ready-to-drive condition
11 as of the time of sale, bus 34 was worth \$195,000, bus 36 was worth
12 \$230,000, and bus 738 was worth \$65,000. After ABC purchased the
13 buses, it expended \$5,677 to repair bus 34, \$7,633 to repair bus
14 36, and \$509 to repair bus 783.

15 **2. Buses Sold to MCI**

16 The remaining three buses surrendered to TCF had been
17 manufactured by Motor Coach Industries (MCI). MCI was the second-
18 largest seller of used buses in North America. TCF caused the
19 three MCI buses (355, 743, and 784) to be listed for sale through
20 MCI, which would receive a five-percent commission on any sale
21 arranged. All three buses were delivered to MCI sometime after
22 July 2011, but were not inspected and ready for sale until
23 September 2011.

24 There is no clear evidence that any of the buses delivered to
25 MCI were ever advertised for sale on MCI's website. Mr. Guralnick,
26 who supervises used bus sales for MCI, testified that MCI does not
27 advertize used buses on its website until the former owner's
28 decals are removed, and that MCI did not remove the decals on buses

1 743 and 784 until it purchased those buses from TCF in December
2 2011. Mr. Guralnick testified that bus 355 was listed on the
3 website, although he did not remember TCF authorizing him to remove
4 the decals on that bus, and was unable to explain how the bus would
5 have been listed on the website without authorization to remove the
6 decals. No third-party offers were received for any of the buses
7 delivered to MCI.

8 TCF sold buses 355, 743, and 784 to MCI on December 27, 2011.
9 MCI paid TCF \$190,991 for bus 743, \$165,185 for bus 784, and
10 \$201,119 for bus 355.

11 The buses were sold to MCI as is, and MCI subsequently spent
12 \$37,662 to repair bus 743, \$27,663 to repair bus 784, and \$15,283
13 to repair bus 355.² Debtor's appraiser testified that in ready-to-
14 drive condition as of the time of sale, bus 743 was worth \$235,000,
15 bus 784 was worth \$200,000, and bus 355 was worth \$286,000.

16 MCI resold bus 355 to a third party in January or February
17 2012 for \$235,000.

18 **DISCUSSION**

19 **A. Governing Law**

20 Under the Uniform Commercial Code³, a secured creditor must
21 dispose of the collateral securing the repayment of an obligation
22 in a manner that is commercially reasonable. UCC § 9-627(b).

23 TCF bears the burden of proving that it sold the buses in a
24 a commercially reasonable manner. UCC § 9-626(a)(1), (2).

26 ² The repairs to bus 355 were ordered before TCF sold the
27 bus, but were paid for by MCI.

28 ³ The contract between Debtor and TCF states that it is to be
governed by Minnesota Law. The Debtor is domiciled in California.
There is no difference between California law and Minnesota law
with respect to the sections of the UCC at issue here.

1 If the court determines that the sale of any of the buses was
2 not commercially reasonable, TCF's deficiency claim must be reduced
3 to the amount it would have been if TCF had sold the buses in a
4 proper manner. It is presumed that the appropriate reduction is
5 the full amount of the deficiency, unless TCF proves that a lesser
6 reduction is appropriate. UCC § 9-626(a)(3), (4).

7 This court will consider the following factors in determining
8 whether the manner of sale was commercially reasonable.

- 9 1. The extent and manner in which the sale was advertised.
- 10 2. The length of time the sale was advertised.
- 11 3. Whether the sale was public or private.
- 12 4. Whether the collateral was repaired as needed before the
13 sale.
- 14 5. Whether prospective buyers had an adequate opportunity to
15 inspect the collateral.
- 16 6. Whether the sale was wholesale or retail.
- 17 7. Whether the collateral was sold in bulk or in parcels.
- 18 8. Whether the debtor and any guarantors were given adequate
19 notice of the sale.
- 20 9. The number and amount of bids received.
- 21 10. The price achieved (although a low price by itself does
22 not show that the sale was not commercially reasonable).
- 23 See Westgate State Bank v. Clark, 642 P.2d 961, 969-72 (Kan. 1982).

24 **B. Application of Governing Law to Sale of Buses to ABC**

25 I find that the sale to ABC satisfies nine of the ten factors
26 identified immediately above.

27 (1) A private sale was the best means of maximizing the price
28 received.

1 (2) The buses were properly offered for sale individually rather
2 than in bulk.

3 (3) Debtor and the guarantor received adequate prior notice of the
4 sale.

5 (4) It was proper to sell the buses wholesale by using a broker.

6 (5) The buses were adequately advertised by being listed on ABC's
7 website. ABC is the largest seller of used buses in the nation.

8 (6) The buses were advertised for an adequate length of time. Two
9 of the buses were listed for seven months, the third bus was listed
10 for thirteen months. The buses were sold two months into the
11 January-June high season.

12 (7) Prospective buyers had a reasonable opportunity to inspect the
13 buses on the ABC lot.

14 (8) The repairs necessary to put the buses in full working order
15 had not been completed while the buses were offered for sale, but
16 the buses had been inspected, the cost of necessary repairs had
17 been estimated, and the repairs identified as necessary were
18 sufficiently minor that the fact that repairs had not been
19 completed would not have deterred potential purchasers.

20 (9) The number and content of the offers received supports TCF's
21 decision to sell the buses to ABC. At the time TCF sold the buses
22 to ABC, two months of the high season had passed without TCF
23 receiving any additional offers to purchase. Moreover, the value
24 of the buses seemed to be declining; the second offer TCF had
25 received was substantially less than the first offer TCF had
26 received. The price at which TCF sold to ABC was only slightly
27 below the highest offer TCF had received when adjusted for the
28 commission avoided.

		Highest Offer less	Price Paid
	<u>Bus</u>	<u>5% Commission</u>	<u>to ABC</u>
2	34	\$134,400	\$125,000
	36	\$134,000	\$135,000
3	738	None	\$60,000

The final factor, price received, weighs against a finding that TCF sold the buses in a commercially reasonable manner. The sale price as a percentage of Debtor's appraised value is shown below. The price that would have been received in a commercially reasonable sale is adjusted to reflect the commission avoided through direct sale to ABC, and for repairs made after purchase by ABC (Debtor's appraisal assumes that each bus is in ready-to-drive condition).

12						Adjusted	Sale Price /
		Sale Price	Appraised	Repairs	Commission	Appraised	Adj. Appraised
13	<u>Bus</u>	<u>to ABC</u>	<u>Value</u>	<u>by ABC</u>	<u>Avoided</u>	<u>Value</u>	<u>Value</u>
	34	\$125,000	\$195,000	\$5,677	\$7,800	\$181,523	69%
14	36	\$135,000	\$230,000	\$7,622	\$9,200	\$213,178	63%
	738	\$30,000	\$65,000	\$509	\$2,600	\$61,891	48%

The fact that another form of sale might have yielded a higher purchase price does not by itself demonstrate that a sale was not commercially reasonable. UCC § 9-627(a).

Upon consideration of all the facts and circumstances, and of all the measuring standards identified above, I find that the sale of buses to ABC in late February 2012 was conducted in a commercially reasonable manner.

C. Application of Governing Law to Sale of Buses to MCI

I find that the sale of three buses to MCI was not conducted in a commercially reasonable manner for the following reasons.

(1) I find that buses 743 and 784 were never advertized for sale on the MCI website. Mr. Guralnick testified that used buses were not listed on the website until the decals of the former owner are

1 removed, and that in this case the decals on buses 743 and 784 were
2 not removed before MCI purchased the buses from TCF. Thus, buses
3 743 and 784 were never effectively advertized for sale to potential
4 purchasers. In this regard, it is worthy of note that no third
5 party made an offer to purchase either bus.

6 (2) Bus 355 was not advertized for a sufficient period of time
7 before it was sold to MCI. If advertized at all, bus 355 was
8 advertized for no more than three months, and that entire three-
9 month listing period occurred during the off season for used bus
10 sales. Again it is worthy of note that no third-party offers were
11 received for bus 355.

12 (3) TCF offered no admissible evidence to support the
13 reasonableness of the price obtained from MCI. TCF was not advised
14 by any independent expert in negotiating the sale to MCI (MCI was
15 obviously acting on its own account and not acting on behalf of TCF
16 in negotiating the terms of the purchase). Although Mr. Laschenski
17 testified that inside experts at TCF prepared an analysis
18 supporting the adequacy of the price obtained, Mr. Laschenski had
19 no personal knowledge of that analysis, and TCF did not attempt to
20 introduce a copy of any written analysis.

21 (4) The lack of advertising and adequate expose to the market,
22 together with the lack of any expert analysis supporting the terms
23 of the sale, by itself shows the sale not to be commercially
24 reasonable.

25 **D. Whether TCF's Deficiency Claim Should be Reduced**

26 Section 9-626(a) of the Commercial Code provides in relevant
27 part:

28 In an action arising from a transaction, other than a
consumer transaction, in which the amount of a deficiency

1 or surplus is in issue, the following rules apply: ...
2 (3)... if a secured party fails to prove that the
3 collection, enforcement, disposition, or acceptance was
4 conducted in accordance with the provisions of this part
5 relating to collection, enforcement, disposition, or
6 acceptance, the liability of a debtor or a secondary
7 obligor for a deficiency is limited to an amount by which
8 the sum of the secured obligation, expenses, and
9 attorney's fees exceed the greater of:
10 (A) the proceeds of the collection, enforcement,
11 disposition, or acceptance; or
12 (B) the amount of proceeds that would have been realized
13 had the noncomplying secured party proceeded in
14 accordance with the provisions of this part relating to
15 collection, enforcement, disposition, or acceptance.
16 (4) For purposes of paragraph (3)(B), the amount of
17 proceeds that would have been realized is equal to the
18 sum of the secured obligation, expenses, and attorney's
19 fees unless the secured party proves that the amount is
20 less than that sum.

21 In applying section 9-626 to determine whether the deficiency
22 claim of TCF should be reduced, I rely upon the following
23 assumptions, procedures, findings of fact, and conclusions of law.

24 (1) With respect to buses 743 and 784, I use the value determined
25 by Debtor's appraiser to be the gross sale price that would have
26 been received if those buses had been sold in a commercially
27 reasonable manner.

28 (2) With respect to bus 355, I will use the price received by MCI
when the bus was resold by MCI as the gross sale price that would
have been received had the bus been sold in a commercially
reasonable manner. I note that MCI was a sophisticated seller and
had every incentive to maximize the price it received, and that a
market transaction is likely a more accurate indicator of value
than an appraisal.

(3) The gross sale prices specified above should be adjusted for
repairs performed at the expense of MCI. This is so because
Debtor's appraiser valued buses 743 and 784 in ready-to-drive

1 condition, and because the sale price actually received for bus 355
2 took account of repairs paid for by MCI. I find that the following
3 expenditures for repair were reasonable and necessary to bring the
4 buses into ready-to-drive condition: \$37,662 for bus 743; \$27,663
5 for bus 784; and \$15,283 for bus 355. In determining the necessity
6 and cost of repairs, I credit the testimony of Mr. Guralnick.

7 (4) The gross sale price for buses 743 and 784 should be adjusted
8 for the commission that would have been paid had the buses been
9 sold to third parties at the appraised value. No such adjustment
10 should be made to the sale price for bus 355, because MCI paid no
11 commission when it resold that bus for its own account.

12 (5) I determine that under section 9-626, TCF's deficiency claim
13 should be reduced by the amount by which the net proceeds from a
14 commercially reasonable sale of the three buses exceeds the amount
15 actually received by TCF from the sale of the three buses.

16 As shown below, I find that TCF would have received \$10,642
17 more if the buses had been sold in a commercially reasonable
18 manner. I conclude that the deficiency claim of TCF against Debtor
19 should be reduced by that amount, pursuant to section 9-626.

20		<u>Bus 743</u>	<u>Bus 784</u>	<u>Bus 355</u>	<u>Total</u>
21	Actual net sale price	\$190,991	\$165,185	\$201,119	
22	Gross price from proper sale	\$235,000	\$200,000	\$235,000	
	Less necessary repairs	\$37,662	\$27,663	\$15,283	
	Less 5% commission	\$11,750	\$10,000	\$0	
23	<u>Net proceeds from proper sale</u>	<u>\$185,588</u>	<u>\$162,337</u>	<u>\$219,717</u>	
24	Proper net price less actual price	(\$5,403)	(\$2,848)	\$18,598	\$10,347

25 CONCLUSION

26 TCF sold buses 34, 36, and 738 in a commercially reasonable
27 manner. TCF did not sell buses 743, 784, and 355 in a commercially
28 reasonable manner, and would have received \$10,347 more in net

1 proceeds had it done so. TCF's deficiency claim should be reduced
2 by the \$10,347 shortfall in proceeds caused by its commercially
3 unreasonable sale of buses 743, 784, and 355.

4 ****END OF MEMORANDUM****